

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 29, 2008

STATE OF TENNESSEE v. AUNE KORNEGAY

**Direct Appeal from the Criminal Court for Sullivan County
No. S51,944 Robert H. Montgomery, Judge**

No. E2007-00645-CCA-R3-CD - Filed April 30, 2008

A Sullivan County Criminal Court jury convicted the appellant, Aune Kornegay, of facilitation to possess over .5 grams of cocaine for resale. The trial court sentenced her as a Range I, standard offender to four years to be served on probation and a \$5,000 fine. On appeal, the appellant contends that the trial court abused its discretion in denying her request for judicial diversion. Upon review of the record and the parties' briefs, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed and
Case Remanded.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which J. CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Whitney P. Taylor, Kingsport, Tennessee, for the appellant, Aune Kornegay.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kent Chitwood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At the appellant's September 26, 2006 trial, Sergeant Jeff Cassidy testified that on March 28, 2005, he was a member of the Sullivan County Sheriff's Department SWAT team. On that day, he and nine to twelve other officers went to 3120 Yorktown Road, Kingsport, Tennessee to execute a search warrant. He was stationed at the front of the team, where he knocked on the door and announced their identity and purpose. He heard movement inside the residence and then entered through the unlocked front door. He went immediately to the bathroom and saw the appellant sitting on the toilet. He ordered her to pull up her pants, handcuffed her, frisked her, and turned her over

to another officer. He then saw a plastic sandwich bag floating in the toilet, pulled it out, and placed it on a nearby table. The bag contained several wet, white, rock-like substances, which he believed to be drugs. Other officers detained a male in the residence, but Sergeant Cassidy did not encounter the male as he entered and proceeded to the bathroom.

On cross-examination, Sergeant Cassidy testified that the appellant complied with his orders to show her hands, stand, and pull up her pants. He did not tell the appellant not to flush the toilet, and she did not attempt to flush it. On redirect examination, he testified that the appellant looked back at the toilet and was hesitant to walk away from it. On recross-examination, he admitted that he had his weapon pointed at the appellant until she showed him her hands.

Detective Ty Steadman of the Sullivan County Sheriff's Department testified that on March 28, 2005, he went to 3120 Yorktown Road, which was a two unit apartment building, to serve a search warrant in the upper unit. He was standing at the rear of the group of officers, and he heard running inside the apartment after they knocked. Once they entered, he saw the appellant in the apartment's bathroom. Sergeant Cassidy placed the appellant into the custody of another officer and then reached into the toilet. Sergeant Cassidy pulled out a wet bag and laid it on a counter. Detective Steadman interviewed the appellant, who told him that she was just visiting the apartment and that she lived five to ten miles away. The search of the apartment revealed a loaded pistol in a television cabinet in a bedroom. The appellant's purse was found in that same bedroom, and it contained \$1200.

Detective Steadman testified that he sent the bag recovered from the toilet to a laboratory for testing. The laboratory report revealed that the bag contained a total of 25.9 grams of crack cocaine. He believed the street value of this amount of crack cocaine would be around \$2600. Most of the crack cocaine rocks were packaged individually in the corners of plastic bags. Based upon the way in which the drugs were packaged and the amount of money found in the residence, Detective Steadman believed that the drugs were intended for resale rather than personal use.

On cross-examination, Detective Steadman testified that this apartment had been under surveillance for approximately one year. He had never seen the appellant there in the forty to fifty times that he had personally conducted the surveillance. He acknowledged that he found no personal possessions of the appellant's in the apartment, other than her purse. He agreed he had testified at the preliminary hearing that the contents of the bag recovered from the toilet felt like three silver-dollar-sized chunks. On redirect examination, he explained that he did not open the bag at the time it was recovered because he did not want to expose its contents further to any chemicals in the toilet water. Based upon his experience, the bag felt like it contained rock cocaine, but he could not see through the bag well enough to determine how many rocks it contained.¹

¹ Following Detective Steadman's testimony, the State presented the testimony of Celeste White, but White's testimony was not included in the transcript. The record reveals neither White's identity nor the purpose of her testimony. The appellant bears the burden of ensuring that the record before this court conveys a fair, accurate, and complete account of what transpired in the court below with respect to those issues that are the bases of the appeal. Tenn. R. App. P. 24(b); see also State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993). In the present

The appellant testified that on March 28, 2005, she lived at 3112 Yorktown Road, Apartment 1, Kingsport, Tennessee. She had rented this apartment in December 2004 from Roger and Donna Greer for \$400 per month. At the time she rented the apartment, she paid \$800, but as of March 28, she had made no further rent payments. On that day, she took \$1200 to the Greers' apartment to pay the three months of rent she owed. When she arrived, the Greers were not home, but Franklin Cook, who did not live there, was present. She decided to wait on Mr. Greer so that she could pay him directly and get a receipt. She went to the bathroom but did not look in the toilet before using it. She had been in the bathroom about thirty seconds when officers barged through the door and ordered her to freeze. She complied with their orders to freeze, stand, and pull up her pants. Then, they handcuffed her. She did not attempt to flush the toilet. The narcotics in the toilet were not hers, and she had not seen them before the officers recovered them.

The appellant testified that she did not have any personal property at the Greers' apartment except for her cellular telephone and her wallet containing \$1200. She had traveled to North Carolina and had gotten the money from her mother on March 24. She returned to Tennessee on March 27. She did not have a checking account at that time. She had been to the Greers' apartment ten to twenty times before March 28 to "hang out." She said that both she and Cook had spent the night there before. She had no knowledge that there would be drugs at the residence when she went there on March 28.

On cross-examination, the appellant testified that she was not employed on March 28 and that she had not worked since she had been laid off from her position as a stocker and cashier at Maxway Retail in April 2004. She moved to Kingsport from Greensboro, North Carolina, at the suggestion of her boyfriend, Rick Rogers, who had lived there previously. She initially lived with him at 3134 Tiffany Court, but she got her own apartment in December 2004. She borrowed \$1200 from her mother, who worked at American Express.

The appellant acknowledged that she did not have an appointment to meet with Greer on March 28. She had been waiting on him for about twenty minutes before the police came. At one point during her wait, Greer's wife entered the apartment. The appellant offered the money to Mrs. Greer, who declined to take it, saying that the appellant should wait on Mr. Greer. While the appellant was in the bathroom, she was talking to Cook through the door and was not paying attention to what was going on. She did not hear anyone running through the apartment before the police came. About five seconds elapsed between the officers entering the apartment and their bursting into the bathroom. An officer had his gun pointed at her when he entered. At the time the officer took her into custody, she still did not realize that there was cocaine in the toilet. On redirect examination, the appellant explained that Mrs. Greer told her that she did not want to accept the money from the appellant because she and Mr. Greer were going through a divorce.

Henrietta Kornegay testified that the appellant is her daughter and lived with her in North

case, this court permitted the appellant to supplement the record with the trial transcript in December 2007. In so doing, the appellant inexplicably failed to have the testimony of White transcribed.

Carolina at the time of the trial. In March 2005, the appellant did not live with her but visited her often. At that time, she gave the appellant \$1200 because she wanted to take care of the appellant, who is her only child. On cross-examination, she stated that after the appellant moved to Tennessee, the appellant was seeking a job and that she gave the appellant money.

The appellant was charged with possession of cocaine for delivery or resale. At the conclusion of the trial, the jury convicted her of the lesser-included offense of facilitation to possess over .5 grams of cocaine for resale.

At the February 22, 2007 sentencing hearing, the appellant asked the trial court to grant her judicial diversion but stated that she would rely on the presentence report in support thereof and provided no additional proof or argument. The presentence report reveals that the twenty-five-year-old appellant was single with no children. The report states that Detective Ty Steadman, the arresting officer, filed an affidavit saying that the appellant was discovered attempting to flush cocaine down a toilet. According to the report, the appellant was interviewed on November 8, 2006, and stated:

The circumstances of my offense is [sic] still unknown to me. I did not commit a crime. I was accused and unjustly found guilty. I don't feel like the trial was fair but neither is life so I have to adjust. I feel like I am suitable for probation because my previous record/current record speaks for itself.

The report provides that the appellant has no prior criminal record.

The presentence report reveals that the appellant graduated from high school in 1999. The appellant reported entering Livingstone College in August 1999 to pursue a degree in sports medicine. She attended Livingstone College through May 2000 and then joined the United States Army in September 2000. She was discharged from the army in December 2000 for medical reasons, specifically acute bronchitis, but she was not able to provide the interviewer with a discharge form. She entered Guilford Technical Community College in January 2006 and received a certificate from their Quick Jobs program in March 2006. The appellant stated that she lived with her mother until May 2004, when she moved to Kingsport, Tennessee, with her boyfriend, Rick Rogers, who is now deceased. Following her arrest in this matter, the appellant returned to Greensboro, North Carolina, to live with her mother.

Regarding her employment history, the appellant reported working fifteen hours per week as a healthcare technician for Shipman Family Care from July 2001 through January 2003, when she was released due to lack of clients. She worked as a customer service representative for RMH from November 2, 2002, to August 2, 2003, earning \$7 hourly. Although the appellant described her reason for leaving this position as "scheduling," the company reported that she was discharged for being excessively absent. She next worked as a stocker and cashier at Maxway from November 2, 2003, through April 2, 2004, earning \$6 per hour. She reported being laid off from this position.

From May 2, 2004, to October 2, 2005, she worked as a store manager for Iwia Urban Wear, earning \$16 hourly. She reported leaving this job because the store closed. From May 2, 2006, to August 2, 2006, she worked as a seasonal receptionist for Emerald Pointe Water Park, making \$6.75 hourly. At the time of the interview, she had been employed by Belk as a sales associate since November 6, 2006, earning \$7 per hour.

In the presentence report, the appellant reported being in good health but also suffering from bronchitis for which she used a prescription inhaler of albuterol. She described her mental health as poor, indicating that she was depressed, but said that she had never sought treatment or counseling for her condition. She reported first consuming alcohol at age twenty-one and characterized herself as a social drinker. She said that she first used marijuana at age twenty and used it weekly thereafter. She claimed to use less than a quarter of an ounce of marijuana at a time and that she had last used it three or four weeks prior to the interview.

At the sentencing hearing, the trial court found that the appellant was eligible for probation and for judicial diversion, noting that she had been convicted of a Class C felony and that she had no prior felony convictions. The trial court then proceeded to consider the enhancement and mitigating factors from the 1989 Sentencing Reform Act. It found that enhancement factor (1) did not apply. With regard to enhancement factor (2), the appellant's history of criminal convictions or behavior beyond those necessary to establish her sentencing range, the trial court found that the appellant had no prior criminal convictions. It found that the appellant did have criminal behavior in that she had admitted using marijuana weekly since age twenty and that this included using marijuana after her conviction in this case. Although the trial court found the appellant's honest admissions about her marijuana use to be important, it gave her continuing drug use, particularly in the wake of her conviction, great weight. It considered the remaining enhancement factors and found none to apply.

The trial court next considered whether any mitigating factors applied in the appellant's case. It found that mitigating factor (1), that the appellant's criminal conduct neither caused nor threatened serious bodily injury, did apply but gave it little weight because this factor applied to every non-assaultive crime. It found that mitigating factors (2) and (3) did not apply. With regard to mitigating factor (4), that the appellant played a minor role in the offense, the trial court held that this factor did not apply and that, in fact, the jury had already reduced appellant's potential sentence for her role in the offense by convicting her of the lesser-included offense of facilitation. It found that factors (5) and (6) did not apply. It noted with regard to factor (6), which applies if the defendant lacked substantial judgment due to youth, that the appellant was twenty-three at the time of the offense, had graduated from high school, and had some college education. The trial court found that mitigating factors (7) through (10) did not apply. It also found that factor (11), that the appellant committed the offense under such unusual circumstances that it is unlikely that she was motivated by a sustained intent to violate the law, did not apply. With regard to this factor, it observed that the appellant did not believe that she had committed a crime while the trial court in its position as the thirteenth juror believed that the evidence that the appellant had committed a crime was "overwhelming." The trial court found that none of the remaining statutory mitigating factors applied.

The trial court next considered non-statutory mitigating factors. The trial court gave some weight to the fact that the appellant had no criminal history and it noted that she did have some work history. It found that she was not remorseful because she believed that she had not committed a crime and she continued to possess and use marijuana while awaiting sentencing. The trial court found no evidence of self-rehabilitative efforts, a voluntary confession of guilt, or that the appellant had been honorably discharged from the military.

After weighing all of these factors, the trial court denied judicial diversion, finding that the appellant was not a good candidate due to her lack of remorse and, most importantly, her continuing criminal behavior. Pursuant to questioning by the court regarding probation, the appellant stated that she was no longer working at Belk but was babysitting and had completed the paperwork to start classes at Guilford Technical Community College.² The trial court sentenced the appellant to four years as a Range I offender and imposed the \$5,000 fine assessed by the jury. It ordered that the appellant would serve her sentence on supervised probation and imposed special conditions therefor.

II. Analysis

The appellant contends that the trial court abused its discretion in denying her request for judicial diversion because it did not consider the appropriate statutory criteria for judicial diversion but, instead, considered her criminal behavior under the sentencing enhancement factors. She maintains that the required criteria, including her amenability to correction, the circumstances of the offense, her lack of a prior criminal record, and her social history, all support the granting of judicial diversion. The State asserts that the trial court properly denied judicial diversion and ordered the appellant to serve four years on probation. It maintains that the trial court followed the appropriate statutory procedure, gave due weight to the legal factors and principles, and made factual findings that are adequately supported by the record. We agree with the appellant that the trial court failed to consider the appropriate criteria for judicial diversion, reverse the judgment, and remand the case to the trial court for further proceedings relative to judicial diversion.

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. See Tenn. Code Ann. § 40-35-313(a)(1)(B). It is within the trial court's discretion to grant or deny judicial diversion. See State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). As such, the trial court's decision will be overturned only if the court abused its discretion. Id. In other words, we will not interfere with the denial of judicial diversion if the record contains any substantial evidence to support the trial court's refusal to grant diversion. Id. Moreover, we observe that "judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under [Tennessee Code Annotated section] 40-15-105." State v.

²The presentence report refers to this institution as Guilford Technical Community College, but the trial transcript lists what appears to be the same college as "Gilfrey Technical Community College." This opinion uses the spelling from the presentence report.

Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

In determining whether to grant a defendant judicial diversion, the trial court must consider all of the following factors: (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the status of the defendant's physical and mental health, and (6) the deterrence value to the defendant and others. State v. Lewis, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997). Additionally, the trial court should consider whether judicial diversion serves the ends of justice – that is whether it supports the interests of the public as well as those of the defendant. Id. The record must reflect that the trial court has taken all of the factors into consideration. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). As a consequence, “we may not revisit the issue if the record contains any substantial evidence supporting the trial court’s decision.” Id. Furthermore, “[t]he court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others.” Id.

The trial court’s findings at the sentencing hearing demonstrate that it denied the appellant’s request for judicial diversion primarily because of her criminal behavior of possessing and using marijuana over the course of five years and, especially, after being convicted of the instant drug-related charge. The appellant argues that unlike enhancement factor (1), the judicial diversion criterion that relates to the defendant’s criminal record does not include consideration of criminal behavior not resulting in a conviction. To the contrary, a trial court may properly consider a defendant’s criminal behavior in determining whether to grant judicial diversion to an eligible defendant. State v. Beverly, 894 S.W.2d 292, 293-94 (Tenn. Crim. App. 1994) (affirming denial of judicial diversion based upon the defendant’s prior criminal behavior involving marijuana use). Although the appellant has no prior criminal record, her continuing marijuana use, particularly following her conviction, reflects negatively on her amenability to correction, which the trial court is also required to consider.

The appellant also objects to being penalized for her honesty in admitting her marijuana use in the presentence report. She argues that, instead, her honest admissions on the report should have been considered to illustrate favorably her amenability to correction. The record reflects that the trial court noted the appellant’s honesty in revealing her marijuana use in the presentence report and commended her for her honest answers but still found that her criminal behavior outweighed her honesty. A defendant’s “current drug usage” is a relevant consideration in determining whether judicial diversion is appropriate. Lewis, 978 S.W.2d at 566. In the present case, the appellant’s weekly marijuana use over a five-year period amply provides substantial evidence to support both the trial court’s finding of criminal behavior in this case and the great weight that the trial court gave it.

More problematic is the trial court’s failure to consider all the factors relevant to judicial diversion. The State contends that the trial court weighed the legal factors and principles and then made factual findings supported by the record. The findings made by the trial court in considering

the enhancing and mitigating factors do relate to several of the judicial diversion criteria as well. The trial court's findings regarding the appellant's criminal behavior and lack of remorse relate to her amenability to correction. See, e.g., State v. Timothy C. Hutson, No. M1999-00329-CCA-R9-CD, 2000 WL 1246429, at * 7 (Tenn. Crim. App. at Nashville, Aug. 18, 2000) (affirming denial of pretrial diversion when lack of remorse showed poor amenability to correction). With regard to the circumstances of the offense, it found that her offense neither caused nor threatened serious bodily injury, and it declined to find that she played a minor role in the offense or that she lacked a sustained intent to violate the law. See Tenn. Code Ann. § 40-35-113(1), -(4), -(11). The trial court considered and gave some weight to the appellant's lack of a criminal record. It also considered some aspects of her social history, such as her work history. On the other hand, the trial court did not make findings that reflect that it considered the appellant's mental and physical health, the deterrence value of diversion to the appellant and others, or whether judicial diversion would serve the ends of justice or the public's interest in this case. Moreover, we agree with the appellant that the trial court's consideration of some aspects of her social history with regard to the mitigating factors, such as its consideration of her age and education level within the framework of mitigating factor (6), did not permit the trial court to weigh the positive nature of those characteristics. See Tenn. Code Ann. § 40-35-113(6).

The trial court was required to consider all of the judicial diversion factors. See Electroplating, Inc., 990 S.W.2d at 229. Given that the trial court failed to address several of the factors and, consequently, failed to explain why the factors supporting the denial of diversion outweighed the factors supporting diversion, we are compelled to reverse the judgment of the trial court and remand the case in order for the trial court to explain adequately on the record why the appellant was denied judicial diversion and why the factors relied on outweigh the others. For guidance to the trial court on remand, we note that although a trial court may properly consider the defendant's remorse in determining whether judicial diversion is appropriate, the fact that a defendant continues to deny that he or she is guilty of the offense in question is not itself a proper basis for denying judicial diversion. Lewis, 978 S.W.2d at 567.

III. Conclusion

Based upon the record and the parties' briefs, we reverse the judgment of the trial court and remand the case further proceedings consistent with this opinion.

NORMA McGEE OGLE, JUDGE